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Division III  
State of Washington  
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NO. 35922-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS G. MARLIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. AN ERRONEOUS RESTITUTION ORDER CANNOT BE SAVED MERELY BECAUSE THE AMOUNT OF RESTITUTION ORDERED WAS LESS THAN COULD HAVE HYPOTHETICALLY BEEN IMPOSED UNDER THE DOUBLING STATUTE

Mr. Marlin stipulated that his criminal actions caused Mr. Dupuy to incur an out-of-pocket loss of \$139. Br. of Appellant at 14. The trial court is authorized to order up to double the amount of the victim's actual loss from the commission of a misdemeanor crime. RCW 9A.20.030(1). The state argues that because the court imposed restitution in the amount of less than twice the amount Mr. Marlin stipulated was owing, regardless of the basis, there was no error. Br. of Resp't at 11-12 ("Because the defendant stipulated to \$139 'out-of-pocket loss' for Dupuy, the \$236 out-of-pocket loss ordered by the trial court is within doubling authorization found under the restitution statute.")

A nearly identical argument was rejected in State v. Fleming, 75 Wn. App. 270, 275-76, 877 P.2d 243 (1994). In that case, the state argued that the amount of restitution actually imposed by the trial court was less than could have been imposed, making any error by the trial court harmless. Id. The court reasoned that the ability to impose up to twice the amount of the victim's loss does not "serve as a safety margin to preserve an otherwise erroneous restitution order." Id. at 276. "Any increase or

doubling of restitution . . . should be a consciously exercised choice by the court.” Id. The record reveals no consciously exercised increase or doubling on behalf of the trial court in this case, and the state’s argument must be rejected.

2. THE SUBSTANCE OF THE STATE’S ARGUMENT AS IT RELATES TO RESTITUTION OWED TO MR. DUPUY’S INSURER INEXPLICABLY FAILS TO ADDRESS MR. MARLIN’S ARGUMENT THAT THE INSURER SUFFERED NO LOSS

Restitution is allowed only for victims’ losses (or for defendants’ gains), and those losses must be causally connected to the crimes charged. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008). Absent agreement from the defendant, the state must prove the amount of the loss by a preponderance of the evidence. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Mr. Marlin argues that Mr. Dupuy’s insurer suffered no loss whatsoever, and that the court’s order for reimbursement to Mr. Dupuy’s insurer therefore must be vacated. Br. of Appellant at 18-19.

The state is unresponsive to Mr. Marlin’s argument in its brief, instead pointing out that “it is entirely appropriate to order restitution to insurance companies that have had to pay for losses caused by a defendant’s criminal actions.” Br. of Resp’t at 12. The point of Mr. Marlin’s argument is that Mr. Dupuy’s insurance carrier has *not* paid

anything, as reported by the insurance carrier itself. CP 162; Br. of Appellant at 18-19. The state's argument is violative of RAP 10.3(a)(6) and RAP 10.3(b), and should be disregarded.

3. THE STATE OBJECTS TO MR. MARLIN'S "RIGID" AND "STRICT CONSTRUCTION OF CAUSATION," WHICH ACTUALLY AMOUNTS TO AN OBJECTION TO MR. MARLIN'S RELIANCE ON CONTROLLING LAW

The court can order a defendant convicted of a misdemeanor to pay restitution whenever the crime in question caused a loss to another. State v. Thomas, 138 Wn. App. 78, 82, 155 P.3d 998 (2007). To prove that a crime caused a victim's loss, the state must establish that the loss would not have occurred but for the crime. Griffith, 164 Wn.2d at 966. Restitution is allowed only for losses that are causally connected to the crimes charged unless the defendant expressly agrees to pay additional restitution. Id. at 965-66; Tobin, 161 Wn.2d 524 ("Restitution is allowed only for losses that are causally connected to the crimes charged.").

The state argues that Mr. Marlin's position, based on the above-cited case law, "loses sight of the purpose of restitution," involves a "strict construction" of causation, and ignores the "eggshell skull" rule. Br. of Resp't at 16-18.

Whatever the purpose of restitution is, Mr. Marlin trusts that the State Supreme Court and the Court of Appeals considered that purpose in

coming to the decisions cited above. Established case law cannot be disregarded merely because the state or the court disagrees with the outcome.

The state does not dispute that the monthly appointments between Mr. Dupuy and his primary care physician—appointments which predated the assault and continued as usual after the assault—would have occurred whether or not Mr. Marlin assaulted Mr. Dupuy. For the first time, however, the state argues that “[d]octor’s time, like lawyer’s time, is billed” and that “it is proper to apportion that time spent [discussing the assault injuries] to the defendant.” Br. of Resp’t at 17-18. The state’s argument may hold weight if Dr. Lahtinen did in fact bill Mr. Dupuy for his time incrementally. However, there is no evidence in the record whatsoever to support the state’s (uncited) assertion. In fact, the ledger demonstrates that all of Mr. Dupuy’s appointments with Dr. Lahtinen before and after the assault were billed at the same flat rate, with no details related to the total time of the appointment. CP 107-11. Perhaps the state is actually arguing that Mr. Marlin should be responsible for pain and suffering or mental anguish caused to Mr. Dupuy in having to discuss his assault-related injuries with his doctors, but Washington law explicitly prohibits the imposition of criminal restitution for a victim’s pain and suffering. See State v. Lewis, 57 Wn. App. 921, 925, 791 P.2d 250 (1990).

While stressing that the record established that some appointments with Dr. Lahtinen were associated with the assault, the state provides no legal authority that would allow the trial court to assess liability against Mr. Marlin for the cost of preexisting events that became associated with Mr. Marlin's actions and resulted in no increased cost to Mr. Dupuy. Br. of Resp't at 16. The state protests: "Defendant's claim, if carried to its illogical conclusion, would eliminate funeral costs to the families of murdered victims because the victims would have died anyway at some point in time." Br. of Resp't at 17-18. This comparison makes very little sense, because it is difficult to imagine a scenario where a murder victim would have a planned funeral already scheduled.

What the state is actually arguing for is a dramatic expansion of what kind of restitution the trial court is permitted to impose and when, based on tort law, worker's compensation law, and foreseeability analyses inapplicable to the facts of this case and the arguments put forth by Mr. Marlin. This argument runs afoul of controlling authority regarding causation and legislative intent when it comes to restitution: "the Legislature has evinced an intent to substantially limit criminal restitution to damages that do not normally require involved or sophisticated proof." Lewis, 57 Wn. App. at 925. Whether Mr. Dupuy's care was related to the assault, or the assault was the primary topic at the appointments, is legally

irrelevant. Substantial evidence did not support the trial court's finding that the assault caused Mr. Dupuy and his insurance company to incur \$1,177.79 in expenses. The restitution order for Mr. Dupuy's out-of-pocket expenses and reimbursement to his insurance carrier for treatment received subsequent to the incident date must be vacated.

B. CONCLUSION

Substantial evidence did not support the trial court's restitution order, requiring vacation of the order. The trial court abused its discretion when it ordered Mr. Marlin to pay restitution for the cost of appointments not caused by the March 18, 2016 assault and when it ordered Mr. Marlin to pay restitution to Mr. Dupuy's insurer when the insurer denied any loss had occurred.

DATED this 6<sup>th</sup> day of March, 2019.

Respectfully submitted,

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